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Supreme Court of the United States

_____Term, 1950

No. [redacted] 92

ATLANTIC COAST LINE RAILROAD COMPANY
Petitioner,

v.

E. A. HILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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WILMINGTON PRINTING COMPANY

SUBJECT INDEX

	PAGE
Petition for Writ of Certiorari	1
Short Statement of Matter Involved	1
Jurisdiction	3
Question Presented	3
Reasons Relied on for Allowance of Writ	3
Brief in Support of Petition	7
Jurisdiction	7
Statement of the Case	7
Question Presented	8
Summary of Argument	8
Argument	9

Cases Cited

PAGE

Bailey v. *Central Vermont RR*, 319 U. S. 350, 87 L. Ed. 1444 14

Brady v. *Southern Railway Co.*, 320 U. S. 476, 88 L. Ed 239 20

Eckenrode v. *Pennsylvania RR Co.*, 335 U. S. 359, 93 L. Ed. 64 20

Ellis v. *Union Pacific RR Co.*, 329 U. S. 649, 91 L. Ed. 572 16

Hill v. *A. C. L. RR Co.*, 336 U. S. 911 ..... 2, 3, 4, 5

Hill v. *A. C. L. RR Co.*, 229 N. C. 236, 49 S. E. (2d) 481 ..... 2, 11

Hill v. *A. C. L. RR Co.*, 231 N. C. 499 ..... 3, 6, 18

Reynolds v. *A .C. L. RR Co.*, 336 U. S. 207, 93 L. Ed. 618 20

Tiller v. *A. C. L. RR Co.*, 318 U. S. 54, 87 L. Ed. 610 ..... 4, 8, 14

Wilkerson v. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497 ..... 20, 21, 22, 23

Statutes Cited

45 U. S. C. A. 51 3

28 U. S. C. A. 1257(3) 3, 6

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Atlantic Coast Line Railroad Company respectfully petitions that a writ of certiorari issue to review the judgment the Supreme Court of North Carolina entered in this case on the first day of March, 1950.

I. Short Statement of Matter Involved

This action was commenced by E. A. Hill, an employee of the Atlantic Coast Line Railroad Company, to recover damages for an injury alleged to have been caused by the negligence of said company.

New crossties were being unloaded from a gondola car.

This was done by men who lifted them over the side of the car and let them fall as the train moved along about five miles per hour. This spread the ties along the track in approximately the position they were to be used. This was the approved method of unloading the ties. Hill was thoroughly familiar with it and had observed it all day long on this particular day. He had to go from the engine to the caboose to put up some signal markers. "I (Hill) was the senior trainman on that train and so I was my own boss as far as my movement back and forth from the engine to the caboose was concerned." He elected to walk alongside the train, without giving any warning whatever that he was coming, close enough for a crosstie to either fall on or bounce against his leg, notwithstanding the entire face of the earth was wide open to him to walk a safe distance from the train (R. P. 22-3-4), and although he had been warned to stay back out of the way, to stay a proper distance away because the Section Foreman could not control the ties after he turned them aloose. (R. P. 34.)

At the close of his evidence the trial court nonsuited his case on the ground that he *had not shown any negligence* by the defendant Railroad Company. He appealed to the Supreme Court of North Carolina (the Court of last resort) and that Court in 229 N. C. 236, 49 S. E. (2d) 481, affirmed the nonsuit on the ground that there was *no evidence of negligence.*

Hill petitioned this Court for a *writ of certiorari.* Instead of granting such writ, if it thought the case should be reviewed, this Court *reversed* the Supreme Court of North Carolina, 336 U. S. 911, and petitioner Railroad Company is yet to have a day in this Court. In other words, this Court gave to petitioner Hill more than he was asking for and without hearing from respondent on that question. Respondent filed brief in opposition to the *allowance* of the *writ,* yes; but not as fully on the merits of the action as it intended to do had the writ been allowed.

Upon the new trial a jury awarded a verdict of $22,000.00 and this time the defendant Railroad Company appealed to the Supreme Court of North Carolina which *again was unable to find any evidence of negligence* but which affirmed the trial court because it considered the decision of this Court to be the law of the case. 231 N. C. 499.

II. The Jurisdiction of This Court

This action was commenced pursuant to the provisions of the Federal Employers' Liability Act, 45 U. S. Code, Section 51; and 28 U. S. Code, Section 1257(3) gives this Court jurisdiction to review the judgment in question. Moreover, this Court has already acknowledged jurisdiction of this action: E. A. Hill v. Atlantic Coast Line Railroad Company, 336 U. S. 911.

III. Question Presented

Is a defendant employer prevented, by the proscription of "assumption of risk" contained in the Federal Employers' Liability Act, from setting up as a defense the fact that an employee's own act, exposing himself voluntarily and deliberately, in violation of the employer's instructions, to a known and obvious danger, is the sole proximate cause of the resulting injury?

IV. Reasons Relied on for Allowance of Writ

When this Court reversed the Supreme Court of North Carolina in the former appeal in this case, 336 U. S. 911, upon the petition for writ of certiorari, it apparently did so upon the theory that the Railroad Company was relying upon the doctrine of "assumption of risk" as a defense. The petitioner in the former appeal had vigorously argued in this Court that the decision of the North Carolina Supreme Court "must have

been" based upon assumption of risk, although this doctrine was not argued by the defendant Railroad, nor was it discussed in the opinion of the North Carolina Supreme Court. In a brief per curiam decision, which contained no statement of its reasons other than the citation of three cases, without explanation, this Court reversed the Supreme Court of North Carolina. One of the cases cited was Tiller v. Atlantic Coast Line, 318 U. S. 54, which dealt wholly with assumption of risk, indicating that this Court was misled by plaintiff's brief in the former appeal, and that this Court based its decision also upon the theory that assumption of risk had been applied against the plaintiff. The truth is that assumption of risk had nothing whatever to do with the case, either on the former or the present trial. Assumption of risk was not pleaded by the Railroad Company; it was not relied upon by the Railroad Company, and no reference to it appeared in the case at any stage until the plaintiff Hill filed *his* petition for *his* writ of certiorari and brief in support thereof, wherein he argued that the Supreme Court of North Carolina must have nonsuited his case on the theory of assumption of risk. It did nothing of the kind. It nonsuited the case because it could find no evidence of negligence.

The present petitioner now respectfully submits that the decision of this Court in Hill v. Railroad, 336 U. S. 911, was mistakenly predicated upon a theory which was not involved in the controversy, and that that decision is, therefore, not the law of the case.

Petitioner therefore relies upon the following reasons for allowance of the writ:

1. Petitioner has not yet had a day in this Court on the merits of the controversy, and the petitioner is entitled to a day in Court.

2. The decision in Hill v. Railroad, 336 U. S. 911, was

predicated upon a theory not involved in the action, and should therefore be overruled.

3. The record is devoid of any evidence of negligence on the part of the Railroad Company.

4. The doctrine "assumption of risk" should be more accurately defined.

Dated: May 26, 1950.

Respectfully submitted,

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Supreme Court of the United States

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. Opinion of the Court Below

The opinion of the Supreme Court of North Carolina is reported at 231 N. C. 499, and appears at Pages 69 et seq. of the Record.

II. Jurisdiction

The jurisdiction of the Court is invoked under Title 28 United States Code, Section 1257(3). The judgment of the Supreme Court of North Carolina sought to be reviewed was entered on March 1, 1950. As the Clerk of the Supreme Court of North Carolina has certified, the opinion of the Supreme Court of that State became final, under the practice prevailing in that Court, March 1, 1950.

III. Statement of the Case

The case is stated under the heading, "Short Statement of Matter Involved" on Page 1 of the Petition for the Writ. It

is respectfully requested that such statement be considered as being incorporated here.

IV. Question Presented

The question we submit here is stated under the same heading at Page 3 of the preceding Petition. Again it is respectfully requested that the question as there stated be considered as restated here.

V. Argument

Summary of Argument

Although there is involved in this appeal the question of the sufficiency of the evidence on the trial below, there is also involved a broader question: Whether an employee may voluntarily and deliberately choose to undergo a known risk, and thereafter charge the employer with responsibility for the injury which proximately results from the employee's own act, upon the theory that the employee cannot "assume the risk" of any action of his own, no matter how deliberate his choice may be.

Upon the first appeal in this case the Supreme Court of North Carolina found that there was no evidence in the record showing want of due care on part of the employer. Upon the second appeal, the Supreme Court of North Carolina was careful to avoid saying that it now found such evidence in the record, but was content to say that the decision of this Court had become the law of the case. The decision of the North Carolina Supreme Court was and still is that the defendant Railroad had been guilty of no negligence. Stated in a different manner, the decision of that Court was that the injury received by the plaintiff employee resulted proximately and solely from his own want of due care, and that there was no negligence on the part of the Railroad which contributed to

that injury. It is respectfully submitted that this is not the doctrine of assumption of risk. There is not involved here a defense enabling a negligent employer to defeat recovery against it. There is involved here an injury to an employee as a result of his own deliberate exposure to a hazard, where the employer was in no sense negligent or derelict in the duty owed to his employees.

ARGUMENT

It was very aptly stated, in a concurring opinion written by Mr. Justice Frankfurter in *Tiller* v. *Atlantic Coast Line*, 318 U. S. 54, 87 L. Ed. 610, that the phrase assumption of risk is sometimes used simply to convey the idea that the employer was not at fault and therefore not liable, while the same phrase sometimes has a totally different meaning as a defense "which enables a negligent employer to defeat recovery against him." (318 U. S. 69.) Mr. Justice Frankfurter goes on to say: "Plainly enough only mischief could result from using a single phrase to express two such different ideas." (318 U. S. 69.)

Precisely the mischief to which Mr. Justice Frankfurter adverts has occurred in the present case. The Supreme Court of North Carolina found that the defendant had violated no duty which it owed to the plaintiff. Upon former appeal to this Court plaintiff promptly took up the cudgels to belabor the time-worn phrase "assumption of risk" although the phrase had not been employed in the decision of the Supreme Court of North Carolina, and although that Court had not based its decision in any sense upon that forbidden defense. The plaintiff, having read the decisions of this Court relative to assumption of risk, had merely found a fast horse to ride, careless that the horse has never been entered in the race. Under the circumstances, it hardly seems necessary to point out that the use of such a phrase by the *plaintiff* is not what Mr.

Justice Frankfurter had in mind. Undoubtedly Mr. Justice Frankfurter was complaining about the use of such a phrase by employers and by judges careless of their phraseology in describing a situation which "assumption of risk" was never intended to cover. Here the confusion and the ambiguity have been created by the plaintiff who complains of it.

The record shows beyond question that the work here involved was being performed in the customary fashion, and that the danger of walking too close to the train was fully apparent to any person who had eyes, and that it was fully apparent to the plaintiff. The plaintiff Hill testified that he had been back and forth between the engine and the caboose on this particular day at least half a dozen times (R. P. 21), that he had not been directed as to which side of the train to walk on or what route to choose (R. P. 21), and that he was his own boss so far as his movement back and forth from the engine to the caboose was concerned (R. P. 22), that the men had been unloading crossties all day long, and that he had been seeing and observing that work all day long, that he could see what was being done, and that he could not help but know as well as anybody else what was being done. (R. P. 23.) The conductor who went from the engine to the caboose at about the same time as did the plaintiff went over to a road about 70 feet from the southbound rails, and walked there in safety. (R. P. 30.) Obviously the same route was available to Mr. Hill, who chose instead to walk directly alongside the train where the crossties were falling, although he had been told that day to *stay back out of the way.* (R. P. 34.)

In view of the obvious character of the danger, and in view of the express instructions which had been given to Mr. Hill, it is respectfully submitted that the employer had every right to expect that Mr. Hill would stay out of the way, and that it had no reason to anticipate Mr. Hill's presence in a position of great hazard, when no one had told him to occupy

that position, and instead had told him specifically to stay out of it. This was the basis of the North Carolina Court's first decision, i.e., that the employer had no reason to anticipate Mr. Hill's presence where he was struck, and therefore had violated no duty to Mr. Hill in failing to discover his presence there. The fact that Mr. Hill deliberately and voluntarily chose to put himself in a position of danger which was entirely and wholly unnecessary, does not raise the defense of assumption of risk. If it does, it is respectfully submitted that a new definition of assumption of risk should be adopted by this Court.

A brief review of the appellate history of this action will illustrate the defendant's present complaint. On September 22, 1948, the Supreme Court of North Carolina handed down an opinion in the first appeal, reported at 229 N. C. 236, 49 S. E. (2d) 481, in which that Court said "the evidence fails to show, under the circumstances here, any duty incumbent upon the workmen on the cars, in unloading crossties in the usual way, to anticipate the movements and position of the plaintiff at the time of the injury. Equally the evidence is wanting in probative value, to show negligent failure on their part to perform a duty owed the plaintiff which proximately caused the injury complained of. Stated briefly, the evidence fails to make out a case of actionable negligence."

Following the rendition of that opinion, the plaintiff applied to this Court for a writ of certiorari, where for the first time appeared an argument with respect to assumption of risk. That argument was made by the plaintiff, *not by the defendant*. The following quotation from Mr. Hill's application is illustrative:

> "Reasons Relied on for Allowance of Writ—The Supreme Court of North Carolina has decided an important question of Federal law in a way probably not in accord with applicable decisions of the Supreme Court of the United States. *From the meager explanation by*

> *the Supreme Court of North Carolina on the basis of its decision to affirm a judgment dismissng the action, which explanation is contained in nine lines of print (Hill v. R.R., 229 NC 237, 238, R.p. 35) it appears that the basis was the principle of law which ruled such cases at common law, to wit: That the master owes no duty to his servant working in a railroad yard or other similar place of danger with respect to the safety of the place to work, or with respect to the negligent acts of his fellow-servants, for that it is the servant's duty to look out for himself in such circumstances.* The decision fails to take into account the fact that that principle of law was cast into oblivion in cases arising under the Federal Employers' Liability Act, as amended in 1939, as construed in TILLER v. A. C. L. RR., 318 U. S. 54, 87 L. ed. 610, 63 S. Ct. 444, 143 ALR 967, and TILLER v. R.R., 323 U.S. 574, 89 L. ed. 465, and LAVENDER v. KURN, 327 U. S. 645, 90 L. ed. 916; and BAILEY v. CENTRAL VERMONT R.R. CO., 319 U. S. 350, 87 L. ed. 1444; and JACOB v. CITY OF N. Y., 315 U. S. 752, 86 L. ed. 1166; ELLIS v. UNION PAC. R.R., 329 U. S. 649, 91 L. ed. 572, LILLIE v. THOMPSON, ____U. S.____, 92 L. ed Adv. Op. 115 (per curiam); JOHNSON v. U. S., ____U. S.____, 92 L. ed. Adv. Op. 360; ANDERSON v. ATCHISON, TOPEKA & S.F. R.R., ____U. S.____, 92 L. ed. Adv. Op. 840 (per curiam), and others." (Emphasis supplied) (Page 7 of Petition for Writ of Certiorari to the Supreme Court of North Carolina and Brief in Support Thereof.)

At Page 18 of the "Petition for Writ of Certiorari to the Supreme Court of North Carolina and Brief in Support Thereof" the following argument appears:

> "The only reasonable explanation of the decision of the court below, since it failed to cite any cases arising under the Act to support its ruling, that occurs to the petitioner, is that the court was influenced by the common law doctrine that the master *owes no duty* to his servant working in a railroad yard, or other similar place of danger, with respect to the safety of a place

to work, or with respect to the negligent acts of his fellow-servants, for that it is the servant's duty to look out for himself in such circumstances.

"That is the doctrine of the assumption of risk which deprived servants of rights of action against their masters in circumstances in which a member of the public might have had relief. For example, in this case there was a roadway running parallel with the track, separated from the southbound track by a spur track and a ditch, upon which the public travels. If instead of propelling the crosstie three times its length from the car in their haste to get home, the respondent's workmen had propelled it four times its length into the highway, and if it had struck down a pedestrian on the highway, there would be no question about his right to recover. But the Supreme Court of North Carolina has decided that the petitioner, because he works for the respondent, is not entitled to recover where the crosstie was thrown the unusual distance of 18 feet, three times its length. There is evidence that his presence should have been anticipated at the point of danger as much as the presence of a pedestrian on the highway. *Therefore the basis of the decision must be that the petitioner as an employee of the respondent had assumed the risk of the negligence of the respondent, its agents and servants.* But in cases arising under the Act the defense of assumption of risk has been absolutely 'obliterated' in a case in which the employer has been negligent. TILLER v. A. C. L. R.R. CO., 318 U. S. 54. And this Honorable Court had refused to permit its recrudescence under another label, to wit, a finding of 'no negligence' on the part of the employer (318 U. S. 54, 66-67). (Emphasis supplied.)

"The theory that the Court below decided this case on the basis that the petitioner assumed the risks of his employment although the opinion does not mention assumption of risk, is bolstered by the fact that the Court below stressed a statement the petitioner made on his cross-examination to the effect that 'on this particular occasion those men were doing what they were

> supposed to be doing.' (R.p. 19, opinion 229 NC at p. 237, R. 34.) The doctrine of assumption of risk means that the employee assumes the ordinary risks of his employment and *it is evident that the Court below had this in mind,* stressing this statement." (Emphasis supplied.)

This Court will now note that the North Carolina Supreme Court had decided nothing such as the plaintiff was asserting. The North Carolina Court did not decide that the defendant owed *no duty* to the plaintiff; it decided that the defendant owed no duty to the plaintiff to anticipate his presence at the place where it was unnecessary for him to be, and where the hazard to the plaintiff was open and obvious.

The petitioner now respectfully asserts that the North Carolina Court was correct, and that the plaintiff Hill succeeded in confusing the issues which were decided in that Court.

This Court, apparently upon the strength of the plaintiff's assertions, concluded that the North Carolina Court had considered assumption of risk. This Court thereupon reversed the case upon petition for writ of certiorari, without hearing. There was a very brief memorandum opinion which did not state this Court's reasons for ordering the reversal, except such as may be inferred from the citation of three cases, all of which were included in the plaintiff's argument with respect to assumption of risk. The Court cited *Tiller* v. *A. C. L. R.R. Co.,* 318 U. S. 54, 87 L. Ed. 610, where the sole question decided was that the doctrine of assumption of risk has been obliterated. The following quotation from the Court's opinion will serve to illustrate the point: "This result (in the lower court) was based on a holding that the deceased had assumed the risk of his position and that therefore there was *no duty owing to him by respondent.*" (Emphasis supplied.)

The Court will note the similarity between the phrase "there was no duty owing to him by respondent" which the Supreme Court here said was the basis of the lower court's

decision in the Tiller case, and the argument made by Mr. Hill to this Court in his effort to secure a reversal of the first judgment of nonsuit. See the quotation from Mr. Hill's Petition for Writ of Certiorari, hereinabove quoted, where Mr. Hill says: "It appears that the basis (of the decision of the North Carolina Court) was the principle of law which ruled such cases at the common law to wit: That the master *owes no duty* to his servant working in a railroad yard . . ." (Emphasis supplied.)

The defendant Railroad again asserts the North Carolina Supreme Court decided no such thing.

This Court also cited *Bailey* v. *Central Vermont R.R.*, 319 U. S. 350, 87 L. Ed. 1444, which involved an injury to a section man who was engaged at the time of his injury in work about a work train. This is the only similarity which that case bears to the one now before the Court. Bailey was instructed to dump the cinders out of a car which was standing on a bridge over a cattle pass. The floor of the bridge was about 18 feet above the ground, and the only available footing at the side of the car was about 12 inches wide, of which about 8 or 9 inches were taken up by a raised stringer. There was no guard rail. Bailey found it necessary to unload the car by opening doors in the floor. This job was accomplished by turning a nut on the end of a shaft. When the doors begin to open this shaft spins, and the operator must disengage the wrench which he uses to turn the nut or turn loose of the wrench to avoid being thrown off balance. When Bailey undertook to open the doors he was thrown from the gangway down to the roadbed below. The Supreme Court held that the car could have been unloaded off the bridge without risk or danger to Bailey, and that failure to so unload the car was negligence. The Supreme Court said:

> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it re-

> quired, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these were facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury." (87 L. ed., at p. 1447.)

Defendant Railroad can find in this language no standard of care applicable to the facts in the present case. Mr. Hill was not required to stand upon a narrow bridge—all outdoors was available to him, and he chose his own route. Lack of a guard rail cannot be described as negligence here, for there was nothing to guard. The crossties were being unloaded on level ground, as the Court said the cinders should have been in the Bailey case. What are the hazards involved in walking from one end of the train to another, as Mr. Hill did, when he has an unlimited space from which to choose his route? There were no hazards similar to those faced by Mr. Bailey. Certainly it required very little effort, since all Mr. Hill had to do was walk, and to walk outside the space in which the crossties were falling, and all the rest of the world was his in which to walk. The defendant Railroad can find no resemblance between the Bailey case and the Hill case.

In *Ellis v. Union Pacific R. Co.*, 329 U. S. 649, 91 L. Ed. 572, which is the last case cited by the United States Supreme Court, Ellis was crushed between a moving railroad car and a building while working as an engine foreman in charge of a switching crew. This Court there said:

> "Petitioner's evidence tended to show the following: Petitioner, aged 41, had been in the employ of respondent only one year, and had a total railroad experience of

two or three years. Just before sunset on March 15, 1943, he was engaged, along with other members of his crew, in backing an engine and box car around a curve on a spur track where visibility was obstructed by a building located on the inside and near the middle of the curve. He was standing on the ground on the same side as the building and to the right of the engine, and was controlling operations by hand signals to the engineer. Engine foremen frequently stand to the right of the engine, on the engineer's side of the cab. A switchman was located around the curve, out of sight of the engineer, on a loading platform at which the car was to be 'spotted.' Petitioner moved between the building and the track in an attempt to be in a central position from which he could receive signals from the switchman and relay them to the engineer. As the car moved past petitioner, it caught and pinned the upper part of his body against the wall of the building, causing serious injuries. The situation was deceptive because the overhang of the car on the curve and its tilt toward the building resulting from a higher outside rail, reduced clearance materially. In fact, the place where petitioner was standing was in the one short segment of the arc of the curve where clearance was insufficient. Petitioner was unfamiliar with the area and its hazards; if there was a sign warning of the danger, he did not see it; no effort was made to warn him personally. The nearness of the track to the building created an unsafe place for work. Though the engineer was an experienced railroad worker thoroughly familiar with this particular spur, and though it was his duty to watch petitioner continuously or stop the engine, he failed either to warn petitioner or to stop in time to avert the tragedy . . ." (329 U. S., at p. 650, 91 L. ed., at p. 575.)

Here again there seems to be little similarity between the facts involved in this opinion and the facts of Mr. Hill's injury. It was Mr. Ellis' duty to be in a place which was inherently unsafe. There is no evidence tending to show such a duty resting upon Mr. Hill. On the contrary, the evidence

shows without contradiction that Mr. Hill was free to choose his own route from one end of the train to the other, and that he could have walked along a road which paralleled the track. Nor is there any evidence tending to show the *place* he chose to be unsafe. In the Ellis case the evidence tended to show that the engineer was under a duty to watch Mr. Ellis continuously or to stop the engine, which he failed to do. There is no evidence tending to show that the engineer was under any duty to watch Mr. Hill, and in fact there was no such duty.

Mr. Hill is not here complaining about the character of the *place* where he was working. Quite obviously he is complaining about the fact that a crosstie was thrown out of the gondola and struck him on the leg. That complaint has nothing whatever to do with the character of the place, as such, in which Mr. Hill was standing. The Ellis case involved primarily a failure to furnish a safe place to work. The defendant Railroad respectfully submits that the Ellis case is clearly distinguishable.

Mr. Hill argued to this Court that assumption of risk had been decisive on the trial below, while the defendant Railroad now asserts that it clearly appears from the record and from the North Carolina Supreme Court's opinion that no such question was even involved in the first trial below.

Following this Court's reversal of the Supreme Court of North Carolina, the case was returned for trial, resulting in a verdict for the plaintiff of $22,000.00. Upon the defendant's appeal to the Supreme Court of North Carolina, that Court said (231 N. C. 499):

> "While this court was of opinion that the evidence offered on the first trial was insufficient to show negligence on the part of the defendant, and that the judgment of nonsuit was properly entered, on the plaintiff's petition for certiorari to the Supreme Court of the United States, the decision of this Court was reversed.

The per curiam opinion did not amplify this brief judgment of reversal.

> "However, as the previous decision of this Court was that the evidence was insufficient to make out a case of negligence, and the ruling was only on the question of nonsuit, the judgment of reversal must be interpreted as a holding by our highest court that there was evidence sufficient to carry the case to the jury on the issue of negligence. Hence it follows that the judgment of the Supreme Court of the United States has become the law of the case, and must be held determinative of the question again presented as to the sufficiency of evidence substantially the same as that previously considered."

The Supreme Court of North Carolina was quite careful not to say that the present record discloses evidence of negligence. It is apparent from the decision that that court is still of the opinion that the defendant Railroad has been guilty of no negligence. Defendant respectfully urges this Court also to find that there was no evidence of negligence.

It might be well to invite this Court's attention to the fact that Mr. Hill devoted a major portion of his first argument to the Supreme Court of North Carolina to the proposition that the Federal Employers' Liability Act had been converted by the decisions of this Court to a workmen's compensation act, and that the Supreme Court of North Carolina could not lawfully direct a verdict in any case, or take any case from the jury, wherever the plaintiff was able to show that an injury had been received in the course of his employment. This argument was seriously urged upon the North Carolina Court, which devoted the major part of its first opinion to refuting it.

Is the Federal Employers' Liability Act, or is it not, a workmen's compensation act? This Court, in a few cases, has spoken directly to this question. In *Wilkerson* v. *McCarthy*, 336 U. S. 53, 93 L. Ed. 497, Mr. Justice Douglas says at Page

68 that "The Act did not make the employer an insurer. The liability which it imposed was the liability for negligence." In *Brady* v. *Southern Railway Co.*, 320 U. S. 476, 88 L. Ed. 239, the Court held, where a derailer mechanism was struck by a moving car approaching the derailer from the rear, the occurrence was so unusual and so contrary to the purpose of the derailer that a provision to guard against such a happening was beyond the requirement of due care. The defendant asserts here that the presence of one of its employees underneath falling crossties, contrary to his specific instructions, was also so unusual, and so contrary to the purpose of the operation that a provision to guard against the presence of such an employee at such a point was beyond the requirement of due care. This is precisely what the North Carolina Supreme Court had decided.

This Court also found the evidence insufficient to show negligence in *Eckenrode* v. *Pennsylvania R.R. Co.*, 335 U. S. 359, 93 L. Ed. 64, and *Reynolds* v. *A. C. L. R. R. Co.* 336 U. S. 207, 93 L. Ed. 618.

Moreover, Mr. Justice Frankfurter, speaking in *Wilkerson* v. *McCarthy*, supra, at Page 65 says, "The easy but timid way out for a trial judge is to leave all cases tried to a jury for jury determination, but in so doing he fails in his duty to take a case from the jury when the evidence would not warrant a verdict by it. A timid judge, like a biased judge, is intrinsically a lawless judge. These observations are especially pertinent to suits under the Federal Employers' Liability Act." If this Court feels, as Mr. Justice Frankfurter asserts, that a concept of negligence is outmoded as a working principle for the adjustment of injuries inevitable under the technological circumstances of modern industry, and that this is an archaic system of compensation for injuries to railroad employees (Wilkerson v. McCarthy, 336 U. S. 65, 66), it still has recognized its duty "to enforce the Federal Employers' Act,

however outmoded and unjust in operation it may be." (336 U. S. Page 66.)

The Court may feel that it is unjust to Mr. Hill to deny him recovery where he has deliberately exposed his own person to injury, but it is hardly applying recognized principles of negligence law to say that an employee's voluntary and deliberate exposure to a known and obvious peril cannot become the proximate cause of the resulting injury because, after all, the employer was responsible for the creation of the dangerous condition, and that the employee cannot be held to have "assumed the risk" of his act, although he performed that act in violation of specific instructions, and did so in the face of a known and obvious danger.

Nor was this the purpose of Congress in "obliterating" the defense of assumption of risk. As Mr. Justice Douglas points out (Wilkerson v. McCarthy, supra, at P. 68), at the time the "assumption of risk" amendment was adopted, ". . . judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work."

Here there was no negligent maintenance of an unsafe condition. The crossties were in a gondola car and they were removed in the only way they could be removed—by dropping them over the side of the car. The only fault Mr. Hill can charge against the defendant is the defendant's failure to anticipate Mr. Hill's negligence and to guard him against the consequences of his own carelessness. To hold the employer liable under such circumstances seems plainly to apply principles of workmen's compensation acts, and not principles of negligence. Certainly the North Carolina Supreme Court was not taking "the easy but timid way out" when it came to the conclusion that the employer had no duty to anticipate

the presence of a workman at a dangerous location when it had instructed the workman to stay away from that location.

The North Carolina Supreme Court decided two propositions: (1) That there was no evidence of negligence to support a recovery by Mr. Hill; (2) that the Federal Employers' Liability Act is not a workmen's compensation act. If the judgment in favor of Mr. Hill is now affirmed, the defendant is led to ask, with Mr. Justice Jackson in his dissenting opinion in Wilkerson v. McCarthy, supra, (336 U. S. at P. 77), in which proposition did the Supreme Court of North Carolina really err?

Dated: May 26, 1950.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 92

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

E. A. HILL,
Respondent

BRIEF OF RESPONDENT E. A. HILL IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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INDEX

Cases Cited

	Page
Hill v. *Atlantic Coast Line RR. Co.*, 336 U. S. 911	8
Hill v. *Atlantic Coast Line RR. Co.*, 229 N. C. 236	6
Hill v. *Atlantic Coast Line RR. Co.*, 231 N. C. 499	2
Insurance Group Committee v. *Rio Grande Western Railroad Company*, 329 U. S. 607, 91 L. Ed. 547	3, 4
State v. *Jersey City*, 30 N. J. Law 247	7
Tiller v. *Atlantic Coast Line Railroad Company*, 323 U. S. 574	8

Treatises Cited

3 American Jurisprudence 345	5
14 C. J. S. 178	7

Rules Cited

Rule 33, Supreme Court of U. S.	5
Rule 38 (5) (a), Supreme Court of U. S.	8